

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AKUA POWELL,	§
	§ No. 352, 2009
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Kent County
STATE OF DELAWARE,	§ Cr. ID No. 0803026578
	§
Plaintiff Below-	§
Appellee.	§

Submitted: October 2, 2009
Decided: October 20, 2009

Before **HOLLAND, BERGER** and **JACOBS**, Justices

ORDER

This 20th day of October 2009, upon consideration of the appellant's brief pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Akua Powell, was found guilty by a Superior Court jury of 11 counts of Robbery in the First Degree, 11 counts of Possession of a Firearm During the Commission of a Felony, 2 counts of Offensive Touching, Conspiracy in the Second Degree, and Wearing a Disguise During the Commission of a Felony. He was sentenced to a total of 66 years of Level V incarceration, to be followed by probation. This is Powell's direct appeal from his convictions and sentences.

(2) Powell's counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that arguably could support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(3) Powell's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Powell's counsel informed Powell of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Powell also was informed of his right to supplement his attorney's presentation. Powell responded with a brief that raises four issues for this Court's consideration. The State has responded to the position taken by Powell's counsel as well as the issues raised by Powell and has moved to affirm the Superior Court's judgment.

¹ *Person v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

(4) Powell raises four issues for this Court's consideration that may fairly be summarized as follows. He claims that a) the prosecutor engaged in misconduct that prejudiced his case by intentionally tampering with the physical evidence at trial; b) the Superior Court abused its discretion by permitting the prosecutor to tamper with the evidence, by admitting irrelevant and prejudicial evidence, and by admitting certain records into evidence that the State had failed to produce in discovery; and c) his separate robbery and weapon convictions constitute a double jeopardy violation.

(5) The evidence at trial established that, in the early morning of Friday, February 22, 2008, twelve individuals who had gathered for their regularly scheduled poker game at Wild Quail Country Club in Dover, Delaware, were robbed by three armed men wearing ski masks and gloves. All of the victims testified that, as they were sitting at the poker table, the gunmen suddenly entered the room yelling threats and ordered them to lie on the floor. Two of the victims were hit in the head with a pistol. The gunmen ordered the victims to put pillow cases over their heads. One of the victims had a ski mask, rather than a pillow case, placed over his head.

(6) The gunmen put the money lying on the poker table into another pillow case and told the victims to empty out their pockets. The gunmen then tied up the victims' hands. The gunmen verbally threatened

and held their weapons to the heads of several of the victims, who testified that they feared for their lives. At least two victims testified that they heard one of the other cardplayers, Hyunjin Kim, a Delaware state trooper, tell the gunmen to calm down.

(7) After the gunmen had fled, some of the victims managed to free themselves and then freed the others. As they started to telephone the police for help, Kim explained that, as a police officer, he would be in trouble if his superiors learned that he had bet money in a poker game. He left before the police got there.

(8) When the police arrived, they took everyone's statements. No one mentioned that Kim had been present at the card game. The police also collected the pillowcases, the ski mask and other evidence. Because the pillowcases were a distinctive red color and made of a distinctive fabric, the police were able to pinpoint the store where they had been purchased---a Wal-Mart in Camden, Delaware. When the police reviewed the store videotapes from several days prior to the robbery, they were able to identify Kim's vehicle in the parking lot and Kim himself.

(9) Armed with that evidence, the police were able to secure a search warrant of Kim's car and residence. During their search, they discovered a Wal-Mart receipt, a black ski mask, and the remains of several

sets of car keys, cell phones and wallets, among other things. Kim was arrested. After accepting the State's plea offer, Kim admitted to being the mastermind of the robbery and explained in detail how he had concocted his plan. Two co-conspirators, Tim Longstreth and Manny Gonzalez, also accepted plea offers and supplied the State with additional information about how Kim's plan had been carried out.

(10) At trial, Kim testified about how he had planned the robbery. He first solicited an old friend from Philadelphia named Jeffrey Powell to help him, who, in turn, introduced Kim to his two younger brothers, Addae and Akua Powell. Kim also solicited Tim Longstreth, his friend from New Jersey, to assist in carrying out the robbery. Longstreth, in turn, asked his friend, Manny Gonzalez, to join in the plot. Kim assured the participants that the poker players would be easy to rob and that they would be reluctant to report the crime to the police because of their involvement in illegal gambling.

(11) During cross-examination, Delaware State Police Sergeant Michael Wheeler, an evidence technician, testified about the black ski mask that had been seized when the police executed the search warrant at Kim's residence. Sergeant Wheeler acknowledged that he had seen a hair fiber on the mask after it was brought in. He stated that he believed the hair was

about three quarters of an inch long and was shaped like a “U.” Sergeant Wheeler also stated that he saw a hair on the ski mask that had been collected by the police at the crime scene. No DNA analysis had been performed on either of the hair fibers. Following Sergeant Wheeler’s testimony, one of the prosecutors handled the ski mask that had been collected at Kim’s residence. It was later discovered that, as a result of the prosecutor’s handling of the ski mask, the hair fiber was lost. The prosecutor acknowledged his error. The next day, the judge read into the record a stipulation between the State and the defense that the lost hair was inconsistent with Powell’s hair type.

(12) Powell’s first claim is that the prosecutor engaged in misconduct that prejudiced his case by intentionally tampering with the ski mask, which caused the hair to be lost. According to Powell, a DNA analysis of the hair would have “exonerated” him. Delaware law requires the State to preserve evidence that is material to a defendant’s guilt or innocence.² The remedy for the State’s failure to preserve potentially exculpatory evidence is a missing evidence instruction.³ The lost hair fiber at issue here would not have served to completely exonerate Powell, even if

² *Lolly v. State*, 611 A.2d 956, 959-60 (Del. 1992); *Deberry v. State*, 457 A.2d 744, 751-52 (Del. 1983).

³ *Lunnon v. State*, 710 A.2d 197, 199-200 (Del. 1998).

DNA testing had eliminated Powell as the source of the hair. Nevertheless, the prosecutor agreed to enter into a stipulation, which was read into the record by the judge and referred to in the jury instructions, that provided Powell with the maximum evidentiary benefit he could have derived from the lost evidence. In the absence of any indication that the prosecutor intentionally tampered with the evidence and in the absence of any indication of prejudice to Powell, we conclude that Powell's first claim is without merit.

(13) Powell's second claim is that the Superior Court abused its discretion in three respects---first, by permitting the prosecutor to tamper with the ski mask; second, by admitting certain clothing into evidence that was irrelevant and prejudicial; and, third, by admitting cell phone records into evidence that the State had failed to produce in discovery. As to Powell's first allegation, there is no evidence in the record that the Superior Court sanctioned any tampering with the evidence introduced at trial.

(14) Powell's second allegation of abuse of discretion involves the admission into evidence of three black knit caps and a pair of black pants found during the search of the Powells' Philadelphia residence. Because Longstreth testified that the Powells were wearing black pants on the night of the robbery, Gonzalez testified that Longstreth was wearing a black

winter hat on the night of the robbery, and Kim testified that the Powells were wearing dark clothing on the night of the robbery, there is no question that the evidence was relevant.⁴ Moreover, we conclude that the Superior Court acted within its discretion in admitting it.⁵

(15) Powell's third allegation of an abuse of discretion is that the Superior Court improperly permitted evidence of a cell phone call to Kim by Addae Powell approximately four hours prior to the robbery to be admitted into evidence in spite of the fact that the State did not provide Addae Powell's cell phone records or Kim's caller ID information to the defense until the first day of trial. Even when the State commits a discovery violation, the Superior Court has discretion, in determining what sanction to impose, to permit the disputed evidence to be admitted.⁶ The phone records at issue here established only a connection between Kim and Addae Powell, not the defendant. As such, the admission of the records resulted in limited, if any, prejudice to the defendant. We, therefore, conclude that the Superior Court acted within its discretion in admitting the evidence.⁷ Based upon all of the above, we conclude that Powell's various claims of abuse of discretion on the part of the Superior Court are without merit.

⁴ Del. R. Evid. 402.

⁵ Del. R. Evid. 403.

⁶ *Snowden v. State*, 677 A.2d 33, 39 (Del. 1996).

⁷ *Id.*

(16) Powell's third, and final, claim is that his separate robbery and weapon convictions constitute a double jeopardy violation. Specifically, Powell argues that his 11 convictions of Possession of a Firearm During the Commission of a Felony must merge into his 11 convictions of Robbery in the First Degree. Under Delaware law, a defendant may be separately charged, convicted and sentenced for both Robbery in the First Degree and Possession of a Firearm During the Commission of a Felony.⁸ This Court has concluded that there is a clear legislative intent to separately punish the two offenses and, for that reason, they are not subject to merger.⁹ We, therefore, conclude that Powell's third claim also is without merit.

(17) This Court has reviewed the record carefully and has concluded that Powell's appeal is wholly without merit and devoid of any arguably appealable issues. We also are satisfied that Powell's counsel has made a conscientious effort to examine the record and has properly determined that Powell could not raise a meritorious claim in this appeal.

⁸ *Washington v. State*, 836 A.2d 485, 490-91 (Del. 2003); *Lecompte v. State*, 516 A.2d 898, 902-04 (Del. 1986).

⁹ *Graham v. State*, Del. Supr., No. 240, 2003, Steele, J. (Mar. 19, 2004).

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice